SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-705

WASHINGTON REEF NET OWNERS ASSOCIATION,
Petitioner

v.

UNITED STATES OF AMERICA, *et. al.*,
Respondents.

Petition of Washington Reef Net Owners Association
For a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

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UNITED STATES OF AMERICA, *et. al.*,
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Petition of Washington Reef Net Owners Association
For a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

Petitioners, Washington Reef Net Owners Association, respectfully request that a Writ of Certiorari be issued from the United States Supreme Court to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered June 4, 1975, and the order denying application for rehearing en banc entered by said court on July 23, 1975.

OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court are included in the appendix attached to the petition previously filed with this Court by the petitioner State of Washington and they are herewith, by this reference, included herein.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 4, 1975. A timely petition for a rehearing en banc was denied on July 23, 1975, and this petitioner's application for an extension of time was filed within ninety days of that date, namely, on October 20, 1975. This Honorable Court's jurisdiction is invoked under 28 USC § 1254(1), an interpretation of the Treaty of Point Elliott, 12 Stat. 927, being required.

QUESTION PRESENTED FOR REVIEW

Are the present day reefnetters operating in what were, at treaty times, "usual and accustomed grounds and stations" of the Lummis?

TREATIES AND STATUTES INVOLVED

Interpretation of the Treaty of Point Elliott, above referred to, is required and, for statutory justification for bringing this action, 28 USC § 1254(1) above quoted.

STATEMENT OF THE CASE

This action was originally initiated by the United States of America, acting through the United States District Attorney for the Western District of Washington, against the State of Washington. Subsequently, many In-

dian tribes intervened as additional plaintiffs and the directors of the Washington State Department of Fisheries and the Washington State Department of Game thereafter intervened as additional defendants. The Lummi complaint in intervention, (Vol. 1, p. 75), sought, in effect, to have the State barred from issuing further licenses for reefnetting and to ban reefnetting, as it has been conducted in Puget Sound since 1934, from the areas presently in use upon the grounds that these were locations granted irrevocably to the Lummi by the Treaty of Point Elliott. The reefnetters, through their Association, applied to participate as a defendant-intervener (Vol. 1, p. 193), which right was ultimately granted to them. (Judge Boldt originally denied the application but, upon a motion for reconsideration, Judge Goodwin granted the intervention.) (Vol. 1, p. 204).

Thereafter, an answer was filed upon behalf of the reefnetters, (Vol. 1, p. 207), and the various issues between the Lummis and the reefnetters were set forth in the Final Pretrial Order, (Vol. IV, p. 766).

In disposing of these issues, the trial court ruled completely in favor of the plaintiffs, including the Lummis, such rulings being encompassed in the Final Decision, Findings of Fact, and Conclusions of Law, (Vol. VII, pp. 1515-1727).

The basis for the jurisdiction of the trial court is the existence of the Treaty and Statute above cited.

It is submitted, pursuant to the requirements of Rule 19, that a Writ of Certiorari should issue from this Honorable Court because the Court of Appeals decided the question affecting these petitioners in a way in conflict

with the prior decisions of this Court in the two Puyallup cases, namely, *Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968) (Puyallup I) and *Department of Game v. Puyallup Tribe,* 414 U.S. 44 (1973) (Puyallup II), in the manner and fashion set forth in the Briefs of petitioners State of Washington and Northwest Steelheaders Council of Trout Unlimited. Furthermore, in deciding upon a strict formula for application of the Treaty of Point Elliott, and in holding that these petitioners were fishing upon the "usual and accustomed grounds and stations" of the Lummis at treaty times, the lower courts have decided an important question of federal law which has not been, but should be, settled by this court.

ARGUMENT

In order to determine what were the "usual and accustomed grounds and stations" for the taking of fish utilized by the Lummis at the time of the Treaty of Point Elliott, it is essential to determine how "reefnetting" was done by the Lummis at, and prior to, treaty times. At trial, the plaintiffs' principal anthropological witness, Dr. Barbara Lane, beginning at page 15 of USA Exhibit 30, described by quotes from Collins how reefnetting was done in 1888 and 1889. She continues the description by quoting, at page 17 of the said exhibit, from a manuscript written in 1951 by another anthropologist, Dr. Suttles. In it, Suttles notes that,

> "Usually the reefnet was located in a kelp-covered reef *a short distance offshore.* Often it was opposite a headland that caused a backward sweep of tidal current. The fish entered with the current. If the location were in kelp

> bed, a channel was cleared so that the fish swam into the channel and into the hidden net. If there were no kelp, the illusion of a channel was created by hanging weeds on lines leading to the net."

More contemporary descriptions of how reefnetting was done by the Lummis in earlier times appears in Reefnetters exhibits, RN 12, RN 13 and RN 14, all three of which are affidavits from Indians given in an early trial held in 1896 and 1897 in the Circuit Court of the United States, District of Washington, Northern Division, i.e., Seattle, wherein the United States, upon behalf of various Lummis sought to restrain the Alaska Packers Association and an adjoining land owner, Kate Waller, from installing fish-traps—then legal, but illegal in this state since 1934—where it interfered with the reefnet operations of the Lummis at Point Roberts at the northern part of Puget Sound.

RN 12 is the affidavit of a Lummi, Jack Sumptilino. On page 1 thereof, he states that he is more than 85 years old and that he had fished [i.e., reefnetted] at Point Roberts since he was so small and young that he could not recollect the first time he fished there. He specifically states,

> "We fished on the reef with nets made of young willow and for anchor ropes we used ropes made out of cedar withes and bark;"

RN 13 is the affidavit of one John Elwood—not a Lummi—who states, at page 1, that the salmon caught by the Lummis passed over and near Village Point reef on Lummi Island a distance of about two miles from the

Lummis' reservation, then to Point White Horn and thence to Point Roberts which is more than thirteen miles north of the reservation. He further adds,

> "That the only places in the course of the run of such salmon where they can be taken by hand nets such as are now and have been from time immemorial used by the Indians is on the reefs over which they cross and at such places on such reefs where the water is not to exceed *two fathoms* in depth; at Village Point and at Point Roberts are the only places in the waters of the lower Puget Sound or Gulf of Georgia where the Indians can catch them;"

RN 14 is the affidavit of Harry Sewalton, a Lummi, who states at the top of the fifth page of his affidavit,

> "'Affiant further says that the said Point Roberts reef and the reef at Village Point on Lummi Island in Whatcom County, are the only two reefs in the waters of said county or in the lower Sound upon which the said Lummi Indians could take salmon with hand or lift nets; that at Village Point the reef is very short and abrupt and it is possible for said Indians to use at most *but few nets upon such reef;*"

(All underlining in the preceding paragraphs has been done by this writer.)

Contemporary methods of reefnetting are set forth in the Transcript of the trial testimony of Jerry Anderson beginning at page 3685 through line 8, page 3695, (Vol.

XVI). A further description of the equipment used and the manner of operation appears in RN 1, the pretrial deposition of reefnetter, John R. Brown, from page 55 through page 69 thereof.

An accurate description of the depths needed for present day reefnetting operations appears in Exhibit RN 9, the direct testimony of Laurence G. Waters. Also in his trial testimony commencing at page 3729 of the Transcript and through page 3732, (Vol. XVI).

The location of the present day gears, and their appearance and operation, is set forth in Exhibit RN 7, which is an aerial map of Legoe Bay, the present principal reefnetting ground. Exhibit RN 8, an overlay, is also of assistance in showing the locations of the various rows and the depths.

We are then confronted with the question, how liberally may Indian treaties be interpreted?

There are various statements in cases such as *Jones v. Meehan,* 175 U.S. 1 (1899), and *United States v. Winans,* 198 U.S. 371, (1905), and *Missouri v. Holland,* 252 U.S. 416, (1920), that the treaties should always be liberally construed for the benefit of the Indians.

There have been other statements, however, from the United States Supreme Court and other Federal Courts putting limits to this rule. *Kansas or Kaw Tribe of Indians v. United States,* 80 Ct. Cl. 264, (1934), cert. denied, 296 U.S. 577; *Osage Tribe of Indians v. United States,* 66 Ct. Cl. 64, (1928), appeal dismissed and cert. denied; *Osage Indians v. United States,* 279 U.S. 811, all held that courts must accept the treaties as written and cannot alter or amend them.

In *Northwestern Shoshone Indians v. United States,* (1944) 324 U.S. 335, at p. 353, Justice Reed, writing the majority opinion, states,

> "We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress."

Justice Jackson concurring for himself and Justice Black, states, in the same case at p. 356, while addressing himself to the question of the liberal interpretation of Indian treaties,

> "Even if both parties to these agreements were of our own stock, [i.e., non-Indian], we being a record-keeping people, a court would still have the gravest difficulty determining what their motives and intensions and meanings were. *Statutes of limitation cut off most such inquiries, not because a claim becomes less just the longer it is denied, but because another policy intervenes—the policy to leave in repose matters which can no longer be the subject of intelligent adjudication."*
> (Emphasis supplied.)

In *Choctaw Nation of Indians v. United States,* (1942) 318 U.S. 423, at p. 431, Justice Murphy stated,

> "Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construc-

tion adopted by the parties. *Factor v. Laubenheimer,* 290 U.S. 276, 294, 295, 78 L. Ed. 315, 324, 325, 54 S. Ct. 191; *Cook v. United States,* 288 U.S. 102, 112, 77 L. Ed. 641, 646, 53 S. Ct. 305. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the same sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' *Tulee v. Washington,* 315 U.S. 681, 684, 685, 86 L. Ed. 1115, 1119, 1120, 62 S. Ct. 862. See also *United States v. Shoshone Tribe,* 304 U.S. 111, 116, 82 L. Ed. 1213, 1218, 58 S. Ct. 794; *Choctaw Nation v. United States,* 119 U.S. 1, 28, 30 L. Ed. 306, 315, 7 S. Ct. 75. *But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Cf. United States v. Choctaw Nations,* 179 U.S. 494, 531, 533, 45 L. Ed. 291, 305, 306, 21 S. Ct. 149; *United States v. Mille Lac Band,* 229 U.S. 498, 500, 57 L. Ed. 1299, 1302, 33 S. Ct. 811." (Emphasis supplied.)

We must then abide by the plain, clear meaning of the key words already quoted above—"at all usual and accustomed grounds and stations" and "in common with all other citizens of the Territory."

Next we must consider what is the meaning to be given

the treaty words, "usual and accustomed fishing grounds and stations".

As the court points out in his Finding of Fact No. 24, beginning at p. 19 of the Findings of Fact, (Vol. VII, p. 1597) the meanings intended by the treaty commissioners were those appearing in the dictionaries then extant. Further, we are in full agreement with that portion of Finding No. 24 which appears at the top of p. 20 of the Findings of Fact that the words "usual and accustomed" were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental.

Let us requote then the meanings for the two words "usual" and "accustomed" as they appeared in the 1828 and 1862 editions of Webster's American Dictionary of the English Language set forth in the Finding:

> "usual Customary; common; frequent, such as occurs in ordinary practice or in the ordinary course of events.
>
> accustomed: Being familiar by use; habituated; inured . . . usual; often practiced."

Applying the meanings, as thus established, to the question of whether or not the Reefnetters, as they presently are functioning, are invading Indian Treaty rights —which is the essence of the dispute between the Lummis and the Reefnetters—we cannot but conclude that in no wise are the areas of Legoe Bay now used for reefnetting either "accustomed" or "usual" "fishing grounds or stations" of the Lummis at Treaty times. The very prim-

itive equipment the Lummis were using at that time, plus the shallow depths and limited locations in which they were compelled to function, totally excludes any argument that reefnetting, as now conducted with several eight ton anchors per vessel, heavy steel cables, substantial depths, and strong tidal problems, is any wise upon "grounds or stations" utilized by the Lummis at Treaty times. In other words, a totally new and entirely different fishing ground has been developed by present day reefnetters in the operations as they are now carried on.

The foregoing conclusion is bolstered further by the last sentence in the court's Finding No. 24, to-wit,

> "The restrictive sense of the terms "usual and accustomed" could have been conveyed in Chinook Jargon."

The Indians, in other words, were intending only to convey an interest in what they were then presently enjoying, i.e., the use of "but few (See Exhibit RN 14, p. 5) locations at Village point (which is at the north end of Legoe Bay) and the others at Point Roberts—an area not in dispute in the present suit.

That present day reefnetters are in no wise utilizing areas used by the Lummis at Treaty times is reinforced further by much other of the testimony or exhibits:

(a) Dr. Barbara Lane concedes, in the Transcript of her testimony at p. 2156, ls. 12-15, (Vol. X, p. 2156), that she is unable to state whether the present reefnet locations are in locations which would have been used by the Lummi Indians.

(b) Exhibit RN 7 shows that the area now utilized

for present day reefnetting is large and extensive. Yet the affidavit of Harry Sewalton, Exhibit RN 14, in the first paragraph of p. 5, states,

> "At Village Point [which is at the northern end of Legoe Bay] the reef is very short and abrupt and it is possible for said Indians to use at most *but few* nets upon such reef;". (Underlining supplied.)

(c) The affidavit of John Elwood, Exhibit RN 13, from the same federal court action states, in speaking of the use by the Lummis of their nets,

> "[nets] such as are now and have been from time immemorial used by the Indians are on the reef over which they cross and at such places on such reefs *where the water is not to exceed two fathoms in depth.*" (Underlining supplied.)

(d) The affidavit of Jack Sumptilino, Exhibit RN 12, in referring to the material used for nets and anchor ropes states,

> "We fished on the reef with nets made of young willow and for anchor ropes we used ropes made out of cedar withes and bark;"

(e) Even Lummi witness, Herman Olsen, states at p. 2955 of the Transcript of his testimony, (Vol. XIII, p. 2955), that the cedar ropes were only twenty feet long. He repeats this statement on the succeeding page of his testimony, 2956.

(f) Such ropes were, therefore, not only far too short to have enabled them to fish at the depths shown in the testimony of Laurence G. Waters, (Vol. XVI, pp.

3729-3732), but they would not have had the strength of the three-quarter inch steel cables nor the one and one-eighth inch synthetic lines now used for anchor lines., Tr. pp. 3699, 3700, (Vol. XVI, pp. 3699-3700). They could not have sustained thirty-two tons of anchors such as are now used in front, (1. 2, p. 3704, Vol. XVI). Four experienced reefnetters, Jerry Anderson, Warren C. Granger, John R. Brown and Glenn Schuler, stated positively and unequivocably, (Vol. XVI, pp. 3695, 3698; Vol. XVI, p. 3739; Vol. XVI, p. 3763; Vol. XVI, pp. 3768, 3769), that in their opinions pre-Treaty reefnet boats owned by the Lummis could not possibly have fished in the areas now used with the lines and anchors then available because of the extreme tidal conditions which sometimes prevail and the depths in which the operations are conducted.

Obviously and unquestionably, therefore, in view of the foregoing points, present day reefnetting is being conducted in an area which would never have been capable of use by pre-Treaty Lummis and which is not, therefore, within an area which may ever have been a "usual or accustomed ground or station". Present day reefnetters are clearly operating outside the area referred to, and included in, the provisions of the Treaty; the Treaty does not apply to them nor should it be the basis for restricting their activities as they have been conducted in the past under state sanction and control.

CONCLUSION

Present day reefnetters are in no wise operating upon the "usual and accustomed grounds and stations" of the Lummis as the latter existed when the Treaty of Point Elliott was negotiated. The primitive fishing equipment

available to the Lummis at the time of the treaty negotiations were wholly incapable of fishing in the grounds now used by the present day reefnetters. The latter are but utilizing—and wholly without discrimination in any way toward the Lummis—a new fishing area developed by them in recent decades, which location is situated wholly outside of any marine area used by pre-treaty Indians.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-588

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 75-592

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 75-705

WASHINGTON REEF NET OWNERS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. 35-56),[1] is reported at 520 F. 2d 676. The order amending the opinion is set forth at Pet. App. 57-58. The opinion, findings of fact, conclusions of law, injunction and interim plan and stay order of the district court are reported at 384 F. Supp. 312. The opinion alone is reproduced at Pet. App. 59-92.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1975, and a timely petition for rehearing was denied on August 4, 1975. The petitions for a writ of certiorari were filed on October 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly declared the treaty rights of the plaintiff tribes.

2. Whether the injunction framed by the district court was an appropriate remedy for the continuing violation of treaty rights that it found.

3. Whether the decision of the court of appeals infringes the Convention of May 26, 1930 (50 Stat. 1355) between the United States and Canada.

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[1] Unless otherwise noted "Pet. App." refers to the Appendix to the petition in No. 75-588, *State of Washington, et al.* v. *United States of America.*

4. Whether the decision of the court of appeals conflicts with the decision of the Washington Superior Court on remand in *State of Washington* v. *Puyallup Tribe, Inc.*, No. 158069, April 8, 1975, and if so, whether review by this Court is appropriate at this time.

5. Whether the evidence supports the findings by the district court that non-Indian reef-net fishermen have pre-empted the usual and accustomed grounds and stations of the Lummi tribe.

TREATIES INVOLVED

The treaties involved are the Treaty of Medicine Creek (10 Stat. 1132); the Treaty of Point Elliott (12 Stat. 927); The Treaty of Point no Point (12 Stat. 933); The Treaty with the Makahs (12 Stat. 939); The Treaty with the Yakimas (12 Stat. 951); and the Treaty of Olympia (12 Stat. 971). With immaterial variations these treaties each provide (10 Stat. 1132-1133):

> ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: * * *.
>
> ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz * * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; * * *.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * *.

STATEMENT

1. The commencement of litigation and findings of fact.

In September 1970, the United States, on its own behalf and as trustee for several Indian Tribes of the State of Washington,[2] brought this suit against the State to require it to comply with treaties guaranteeing off-reservation fishing rights to the Indian Tribes.

The essential questions to be decided were the measure of the fishing rights provided the Tribes by treaty, whether the then-existing state regulatory scheme infringed upon those rights, and, if so, what relief should be granted.

After extensive pretrial development of the evidence and an 18-day trial, the court entered detailed findings of fact (Findings 1-253, 384 F. Supp. at 348-

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[2] Additional Tribes intervened; the Tribes originally represented by the United States intervened on their own behalf or obtained private counsel. The Washington State Department of Fisheries and Washington State Game Commission, their respective Directors, the Washington Reef Net Owners Association and, in the court of appeals, the Northwest Steelheaders Council of Trout Unlimited, subsequently intervened as additional defendants.

399), which are not contested by the parties[3] and are amply supported by the evidence. Essentially the court found that the treaty Tribes fished for trade as well as subsistence and ceremonial purposes at the time the treaties were made (Findings 2-14, 384 F. Supp. at 350-353). In negotiating the treaties the Tribes were willing to restrict their residence to reservations and were willing to give up claims to large areas of land, but they insisted, and the United States agreed, that they could continue to fish in their usual and accustomed places off the reservations although they would have to share those fisheries with the citizens of the territory (Findings 19-28, 384 F. Supp. at 355-357).

Subsequent to the treaties, the Indians continued fishing on their reservations and at their usual and accustomed places off the reservations, and such fishing "still provides an important part of their livelihood, subsistence and cultural identity" (Finding 31, 384 F. Supp. at 357; Findings 29-34, 384 F. Supp. at 357-358). Many of the Tribes have adopted written fishing regulations for on and off-reservation fishing designed to assure proper escapement (Findings 34, 42, 59, 69, 79, 90, 99, 116, 124, 159, 160, 190, 384 F. Supp. at 358-387).

The court found that as the number of non-Indian fishermen grew and the State adopted conservation measures, those measures favored non-Indian fisher-

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[3] Except those concerning reef-netting near the Lummi reservation, which are contested by the Washington Reef Net Owners Association.

men to the detriment of the treaty-fishermen. More specifically, the court found that "[e]nforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians" (Finding 193, 384 F. Supp. at 388); that tribal fishermen have avoided using some usual and accustomed fishing places because of State enforcement actions (Finding 33, 384 F. Supp. at 358); and that the Departments of Fisheries and Game have seized and detained Indian boats, nets, and fish caught by Indians without notice to their owners and without judicial proceedings (Findings 194, 195, 384 F. Supp. at 388).

The court also found that "[t]he regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places to which the treaties apply" (Finding 217, 384 F. Supp. at 393).

There was no showing that the tribal fishing on reservation, which had been free of State control,[4]

[4] See Pet. App. 66 and n. 2. See also, *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557.

had been detrimental to conservation, although many of these reservations straddle the mouths of major river systems, thus making the essential spawning escapement for any run dependent upon passage through them. As to off-reservation fishing the court noted (Pet. App. 77, n. 26):

> With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

2. The position of the parties, and the relief requested.

The Washington State Game Commission (Game) argued that except for a right of access over private lands and an exemption from the payment of license fees, the treaties afforded the Indians no rights not enjoyed by other citizens and thus any regulation treating Indians and others equally (such as a prohibition of net-fishing at a usual Indian fishing ground) is valid.[5] The Washington State Department of Fisheries, contrary to Game, recognized that the treaties in question provided the Tribes with

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[5] Game, Pre-Trial Br., p. 3; Final Pre-Trial Order, pp. 79, 137; see also Game, C.A. Br., pp. 57, 59, 61.

special fishing rights at their usual and accustomed places and obliged it to afford the tribes a "fair and equitable share" of the harvestable salmon returning to those waters (Fisheries, Pre-Trial Br., p. 2; Final Pre-Trial Order, pp. 137-138). It contended that its regulations are a lawful exercise of State police power, but it requested the court "to quantify the treaty right by reference to an objective, definite standard" which should be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to waters of the State of Washington in the case area" (Fisheries Pre-Trial Br., pp. 8, 22; see also p. 2). In its post-trial brief (p. 36) and in argument in the district court (Tr. 4384) Fisheries proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the Tribes.

The Tribes argued that the State is without authority to regulate their fishing, that the State has no right to permit such heavy fishing by non-Indians before the fish reach the Indians, and the State contrary to the treaties, is preventing the Indians from taking fish necessary to satisfy their needs. They argued that the test under the treaties should be their needs, not a percentage of the harvest, drawing an analogy to water rights in *Winters* v. *United States*, 207 U.S. 564 (see, *e.g.*, Muckleshoot, et al., Pre-trial Br., pp. 8-11).

The United States conceded that the State has the power to regulate off-reservation Indian fishing, but only if it is shown that the regulation is reasonable

and necessary for conservation, meets appropriate standards, and does not discriminate against the Indians by making them suffer the brunt of the conservation measures. The United States argued that Tribes which can show their ability to regulate themselves should be permitted to do so; and that non-Indian fishing should be regulated in such a manner as to permit the Tribes at their off-reservation fisheries the opportunity to catch as many fish as needed to fill their needs, but because of the requirement of fishing "in common with citizens of the Territory," the Tribes, in their off-reservation fisheries, are entitled to not more than 50 percent of the harvestable portion of the runs involved (Respondent's Post-Trial Br., pp. 81-84).

3. The district court's rulings.

The district court held that each of the plaintiff Tribes under the several treaties at issue had reserved to itself and its members an exclusive right of fishing within their reservation boundaries, and a right to fish at all usual and accustomed grounds and stations outside those boundaries but "in common with citizens of the Territory" (Pet. App. 66). As to the scope of the right the court held (Conclusion 20, 384 F. Supp. at 401):

> The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times, and which exists in part to provide a volume of fish which

> is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.[6]

The court further held that the right of a treaty Tribe to take anadromous fish may be regulated by the State, but only if such regulation (a) does not discriminate against the treaty Tribe's reserved right to fish, (b) meets appropriate due process standards and (c) is shown to be both reasonable and necessary to preserve and maintain the resource (Conclusion 29, 384 F. Supp. at 402).

The court also held that the 1937 convention between Canada and the United States did not modify the treaties with the Indians but that "treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission [established by the convention] must comply with regulations of the Commission" (384 F. Supp. at 411).

The court reserved the question of the effect of fish hatcheries (whether Indian, federal, or state) and environmental changes (such as dams) on the fishing rights for a subsequent hearing, preparation for which is now underway (see 384 F. Supp. at 411).

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[6] See also Conclusions 21-29, 384 F. Supp. at 401-402.

4. The relief granted.

The court held that in light of the facts found, plaintiffs "are entitled to injunctive relief against the continuation and repetition of acts and omissions which are in violation of the treaty-secured rights of the plaintiff tribes and their members" (384 F. Supp. at 413).

In the injunction the court recognized the overriding authority of the State in preserving the fishery (Injunction, par. 8, 384 F. Supp. at 415) and provided for state emergency regulations over all tribal off-reservation fishing without prior court approval (Injunction, par. 19, 384 F. Supp. at 417). The court, however, provided that Tribes meeting certain standards (Pet. App. 80-81) would be permitted to regulate their own off-reservation fishing subject to monitoring by the State, state emergency regulation, and return to state regulation in case of abuse by the Tribe (Injunction, par. 2, 384 F. Supp. at 414). Tribes not meeting the qualifications would be subject to state regulation in their off-reservation fishing but the State must establish to the satisfaction of the Tribe or, if the Tribe is dissatisfied, the court in advance that its regulations conform to the requirements of the decision (Injunction, par. 3, 384 F. Supp. 414-415).

The court also directed the State to reduce non-Indian fishing of runs that would normally pass through the usual and accustomed off-reservation fishing places of the treaty Tribes to the extent nec-

essary to permit treaty Indians to exercise their fishing rights. In response to requests by both the United States and the State, the court established a formula for determining the maximum extent of the Tribes' entitlement (Pet. App. 84-87; see also Pet. App. 46-50). The formula provides basically that the Tribes are entitled to have the opportunity to fish for up to one-half of any run of fish that normally would pass through their off-reservation sites, with various adjustments for fish caught beyond state jurisdiction and for subsistence and ceremonial fishing. On-reservation catches are not to be included in the one-half (*ibid.*).

The court directed the state defendants, prior to each fishing season, to obtain data from the Tribes as to the types of gear they expect to use and the quantity of fish they expect to be able to take, and to take account of such information and the limits of the Tribes' entitlement in making its predictions and regulations for the coming season (Injunction, par. 17, 384 F. Supp. at 417). The court also entered an interim plan and stay order for the gradual and orderly implementation of its judgment (384 F. Supp. at 420).

5. The decision of the court of appeals.

The court of appeals, in a thorough opinion (Pet. App. 35-56) affirmed. It emphasized that the Tribes, in the treaties giving up their lands, expressly reserved the fishing rights in question and that those rights exist as a matter of federal law. It held (Pet.

App. 42) that the State "[i]n treating Indian fishermen no differently from other citizens of the state * * * has rendered the treaty guarantees nugatory."

Citing *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, the court rejected the Tribes' contention that they could not be subject to state regulation if necessary for conservation; but the court emphasized the burden of the State to show that its regulations, as applied to Indian fisheries, are necessary to conservation (Pet. App. 42-44).

The court further held that the Tribes were entitled to equitable relief (Pet. App. 39). It reviewed and approved the relief granted by the district court (Pet. App. 46-53). The court noted (Pet. App. 46) that "[t]he district court's apportionment does not purport to define property interests in the fish * * *. Rather, the court decreed an allocation of the *opportunity* to obtain possession of a portion of the run" (emphasis in original). It also noted that (*ibid.*):

> The district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public.

In so holding, however, the court made the important clarification that the adjustment established by the district court for fish taken before they reach the treaty fishing grounds should not take account of fish caught by non-Washington citizens outside the state's jurisdiction (Pet. App. 55). The court remanded the case to the district court's continuing jurisdiction (*ibid.*).

ARGUMENT

1. The special fishing rights reserved to the respondent Tribes in the treaties in question have been recognized by this Court in *United States* v. *Winans*, 198 U.S. 371, and *Tulee* v. *Washington*, 315 U.S. 681, and, more recently, *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (*Puyallup* I) and, after remand, *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (*Puyallup* II). These decisions have made clear at least the following propositions as to treaty protected Tribes:

1. The Tribe has an exclusive fishing right on its reservation.
2. It has off-reservation rights which the State is not free to limit as it can the fishing privileges of other citizens.
3. The State may regulate Indian off-reservation fishing but only if the regulation is necessary for conservation and does not seek to accomplish that conservation goal through imposing unfair sacrifices on Indian fishing for the benefit of non-Indian fishing.
4. Both on and off-reservation rights are reserved rights retained by the Indians in the bargain by which they gave up large areas of land; they must be preserved in a meaningful manner, assuring the Indians their share of the available catch according to a formula to be worked out.

But despite these established principles, the Tribes have been repeatedly deprived of the fishing oppor-

tunities provided them by treaty, as the courts below found. See also *Puyallup* II, *supra*, 414 U.S. at 48. The district court's task in this case was thus, as a court of equity, to establish a remedy that would assure the protection of these rights. Part of the remedy, at the request of the State and the United States, was the establishment of a percentage for determining the fishing opportunity of the Tribes as to the runs that pass through their usual and accustomed grounds. Another part of the remedy was to minimize daily conflict by recognizing the responsibility as well as the rights of the Tribes and the duties of cooperation between the Tribes and the State under overall state control.

The State (No. 75-588, Pet. 11-16) and Northwest Steelheaders (No. 75-592, Pet. 25-30) argue that allowing any Indian self-regulation of off-reservation fishing is in direct conflict with *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556. In that case the Court held that a reservation by the Seneca Nation of a privilege of fishing in a lake on land they had ceded to an individual did not exempt them from state regulations prohibiting spear fishing. The Court emphasized the right of the State to regulate fishing and refused to interpret the treaty as having a contrary intent. The Court pointed out that the regulation applied equally to Indians and non-Indians and thus did not discriminate against the Indians (*id.* at 562).

Here, by contrast, treaties agreed to under different circumstances and containing different language, have been held by this Court to create fishing *rights* which can only be limited if necessary for conserva-

tion of the fishery. The Court has specifically rejected the concept that subjecting Indians and non-Indians to identical state regulation is consistent with the treaties (*Puyallup II*, *supra*, 414 U.S. at 48). Moreover, here, in contrast with *Kennedy*, the courts below found abuse by the State in the substance and enforcement of its regulations. In sum, *Kennedy* was not concerned with, and does not prohibit, the kind of specific relief granted in the particular circumstances, and in light of the history, of this case.

Moreover, unlike the situation in *Kennedy*, the district court here (over the objections of the Tribes), carefully preserved the State's right to supersede tribal regulation. Even the Tribes that qualify as self-regulating have an exemption from State regulation only so long as they continue to meet the qualifications and conditions prescribed in the district court's decision (which include reporting to the State and permitting state monitoring) and are always subject to state emergency regulations.

This limited self-regulation permitted the Tribes is consistent with the district court's findings that the Tribes had not threatened conservation in their previous fishing and that (Pet. App. 77):

> "state regulation of off-reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future."

Nor, contrary to the State's contention (No. 75-588, Pet. 14-16) does this limited self-regulation violate principles of territoriality. The treaties establishing the Reservations provided for the off-reservation fishing rights as part of the same bargain, and those grounds, for fishing purposes, are properly considered as analogous to territorial waters of the Reservations and not extra-territorial. In any event, the Tribes, through custom and later through written regulations, have apportioned and regulated the use of this tribal right by their members. This intra-tribal regulation, at least, is a matter of tribal self-government within the competency of the Tribe (see *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170-173) and the Ninth Circuit, in a prior case, specifically held that a Tribe may enforce such regulations against a tribal member by arrest at the fishing grounds. *Settler* v. *Lameer*, 507 F.2d 231.[7]

2. The State argues (No. 75-588, Pet. 16-19) that the district court's restriction of state regulation conflicts with this Court's decisions in *Puyallup I* and *Puyallup II*, as well as earlier decisions, because those decisions upheld the State's police power "to regulate Indian off-reservation fishing provided its regulations were reasonable and necessary for conservation and non-discriminatory" (Pet. 16). In this case, however, the State of Washington's regulation of off-reservation fishing by Indians was neither rea-

[7] Even if that were not so, the regulations could be enforced by denial of tribal fishing rights to errant tribal members, thus subjecting such members to direct state jurisdiction.

sonable and necessary for conservation nor non-discriminatory, but in fact constituted a significant and unwarranted diminishment of the Indians' treaty-guaranteed fishing rights. The district court's remedy, as clarified by the court of appeals, is based on the particular abuses revealed by the evidence. As a pattern of cooperation develops, the decree can no doubt be modified, but at the moment it serves to make real the rights recognized by this Court since 1905 in *Winans* and most recently in the *Puyallup* cases. As Judge Burns stated in his concurring opinion below (Pet. App. 56):

> The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.[8]

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[8] For the reasons expressed above and in paragraph 1, *supra*, the Northwest Steelheaders argument (No. 75-592, Pet. 30-44) that the decision below violates *Milliken* v. *Bradley*, 418 U.S. 717, is not well taken. First, the remedy does not exceed the scope of the violation of rights found by the district court. The court specifically found that state fishing regulations and enforcement had infringed on the off-reservation fishing rights of the Tribes and the injunction was directed to those violations. Compare *Milliken*, 418 U.S. at 744-745.

Second, the court has carefully *preserved* the overriding regulatory power of the State. The parade of horribles stated by the Steelheaders is entirely unrealistic. The State has not sought to regulate on-reservation fishing; thus the un-

3. The State (No. 75-588, Pet. 19-22) and the Steelheaders (No. 75-592, Pet. 45-51) argue that the courts below should not have "quantified Indian fishing rights in terms of a percentage of the harvest" (No. 75-588, Pet. 19). Yet, as we have discussed (p. 8, *supra*), the State requested such a quantification so that escapement goals could be computed. The State, however, suggested an arbitrary one-third division between treaty fishermen, commercial fishermen and sports fishermen—a division having no connection with the intent or language of the treaties and in effect splitting one party to the treaty into two parties. The district court found, and the court of appeals agreed, that the division supported by the treaty, while necessarily being an approximation, must be based on a 50-50 division of the fishing opportunity for those runs that pass through the usual grounds and stations of the tribe (see Pet. App. 84-87, 47-48).[9]

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realistic fear of Indians blocking a river running through their reservation or stretching a net across the outlet of a fish hatchery on such a river (No. 75-592, Pet. 35-36) is not an issue in this case. Moreover, a state emergency regulation could instantly prohibit such an action off-reservation. Nor is regulation of mesh size, times of fishing, and the like prohibited by the decree where necessary for the conservation of any species, even those not the direct subject of the regulation. (Compare No. 75-592, Pet. 41-44.)

[9] Reservation takes are excluded from this figure because the treaties contemplated exclusive Indian fisheries there; off-reservation ceremonial and subsistence fishing were excluded as *de minimis*. The "equitable adjustment" compensates for fish destined for Indian grounds but caught by non-Indians before they reach those grounds. See Pet. App. 46-50.

But it should be clear that the 50 percent guideline is not a guarantee of any harvest. It is simply a readily understandable measure of what portion of the harvest the Tribes as a group may rightly insist they should have a *chance* to take in variable circumstances. The shares worked out for specific runs in particular years with specific Tribes will vary from the guideline, in accordance with the extent of Indian fishing capability, the size of the run, the degree of Indian and non-Indian interest in the run, and the give and take of cooperative operations (see p. 12, *supra*).

The State argues (No. 75-588, Pet. 21-22) that the decree has "financially destroyed" some non-Indian fishermen and has "seriously depressed" the non-Indian fishing industry. The State refers to no data in support of this. Since there is no evidence that the decree has either increased or decreased the total fishery, it is true that to the extent the Indian catch has increased, the non-Indian catch has been decreased. Nothing suggests, however, that the total Indian fishery involved here has increased even to the one-third suggested by the State. Indeed, to the degree that the Indians are few (see No. 75-588, Pet. 20-21) or poor, their ability to catch a significant percentage of a major run is reduced and the decree is adjustable by their actual experiences (see p. 12, *supra*).

4. The State argues (No. 75-588, Pet. 23-28) that the courts below erred in not declaring that the Convention of May 26, 1930, between the United States

and Canada, 50 Stat. 1355, abolished Indian fishing rights as to Fraser River salmon. The Convention established the International Pacific Salmon Fisheries Commission (IPSFC) as a regulatory body and provided for an equal division of fishing rights as to Fraser River salmon between Canada and the United States.

The decision below presents no issue regarding that Convention requiring further review. Both the district court (384 F. Supp. at 411) and the court of appeals (Pet. App. 49-50) specifically held that all persons, including treaty protected Indians, are subject to the regulations of the IPSFC. Thus there is no question of the decree impinging upon the authority of the IPSFC.

The courts below also correctly held (*ibid.*) that the Convention did not repeal the treaties with the Indians in regard to Fraser River salmon. Under the Convention and implementing statutes and regulations, the fishermen of the United States are entitled to take one-half of the Fraser River sockeye and pink salmon run. Since the treaties between the United States and the Indian Tribes deal only with rights and powers within the United States' jurisdiction, their provisions can apply only to the United States' half. Nothing in the 1930 Convention, however, conflicts with the Tribes' rights to harvest a fair share of the United States' portion if they are part of the runs passing through the Tribe's usual fishing grounds. Since the Convention is thus not in conflict with the earlier treaties it cannot be held to have tacitly re-

pealed them. *Menominee Tribe* v. *United States*, 391 U.S. 404, 413; *United States* v. *Payne*, 264 U.S. 446, 448; *United States* v. *Lee Yen Tai*, 185 U.S. 213, 221; *Whitney* v. *Robertson*, 124 U.S. 190, 194.

The Steelheaders (No. 75-592, Pet. 51-55), apparently joined by the State (No. 75-588, Pet. 27-28), argue that the decision of the court of appeals sanctions district court interference with the foreign policy of the United States through sanctioning disobedience of IPSFC regulations. This is incorrect. As we have demonstrated, both courts below specifically recognized the supremacy of IPSFC regulations. If any subsequent actions interfere with the regulations of the commission they are not sanctioned by the decision under review.[10]

5. The Steelheaders argue (No. 75-592, Pet. 56-59) that the Court should grant review to resolve a possible conflict as to rights to hatchery fish between

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[10] Since the decision, the United States through its membership in IPSFC and through diplomatic channels has sought to have the IPSFC alter its regulations to take account of a special Indian fishery within the United States entitlement, by modification of time and equipment requirements adopted for a more efficient commercial fishery. The post-decision proceedings, which the State characterizes as requiring a violation of IPSFC regulations (No. 75-588, Pet. 27-28), are concerned with the same general subject as this negotiation. The State proceeding is described as presently on appeal to the State Supreme Court (No. 75-588, Pet. 27-28), and review here is thus inappropriate. No direct review of the denial of interim relief by the court of appeals has been sought. Moreover, the specific subject of those suits is now moot (see No. 75-592, Pet. 55) and the general issue may be resolved by negotiation within the IPSFC.

the decision below and that of the state court on remand of *Puyallup II*. But as they point out (No. 75-592, Pet. 56-59), the state superior court decision has been appealed to the Washington Supreme Court, which has not ruled on it. Moreover, this is an issue not yet ruled on by the district court or court of appeals in this case (see p. 10, *supra*). Thus any potential conflict (and there may be none) is not ripe for resolution.

6. The Washington Reef Net Owners Association seek review (No. 75-705, Pet. 2) of the single question whether its members are operating in what were, at treaty times, "usual and accustomed grounds and stations of the Lummis." Both the district court and court of appeals have resolved this largely factual question against petitioners and further review is not warranted. The opinion of the court of appeals, at Pet. App. 50-53, fully discusses and properly rejects petitioner's argument.

CONCLUSION

The remedy provided by the courts below is a careful application of the principles announced by this Court to the detailed facts of this case. It contains its own mechanisms for modification as experience is obtained in its application. For these and the reasons set forth above, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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October Term, 1975
Nos. 75-588, 75-592, 75-705

STATE OF WASHINGTON, et al., *Petitioners,*
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and
NORTHWEST STEELHEADER COUNCIL OF TROUT UNLIMITED, *Petitioners,*
v.
UNITED STATES OF AMERICA, QUINAULT TRIBE OF INDIANS, et al.,
and
WASHINGTON REEF NET OWNERS ASSOCIATION, et. al., *Petitioner,*
v.
UNITED STATES OF AMERICA, et al., *Respondents.*

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT—FILED ON BEHALF OF PURSE SEINE VESSEL OWNERS ASSOCIATION, PUGET SOUND GILL NETTERS ASSOCIATION, WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, WASHINGTON KELPERS ASSOCIATION, NORTHWEST FISHERIES ASSOCIATION AND WEST COAST TROLLERS ASSOCIATION

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BASIS FOR FILING OF *AMICI CURIAE* BRIEF

This *amici curiae* brief is filed pursuant to Supreme Court Rule 42 and the unanimous consent of all of the parties. The written consents have been filed with this Court.

INTEREST OF *AMICI CURIAE*

Amici curiae are associations of commercial fishermen, vessel owners and processors. Their members fish all waters encompassed by the case area and take all species of sal-

mon which are involved in this case. Combined, their members catch over 90% of the commercial salmon taken by non-Indians in the case area. They employ every method of commercial fishing except reef nets. These include purse seining, gill netting, trolling, onshore trolling, or "kelping", and commercial operation of sport fishing charter boats. Their investment in vessels alone is estimated at more than $150,000,000.00.

Although the economic impact of this decision falls almost entirely on *amici curiae* and its members, they were not parties and those who sought to intervene were denied the right to do so, and continue to be denied the right to intervene under the district court's "continuing jurisdiction".[1] By comparison, the district court has permitted intervention by every Indian tribe that requested the right to do so.

Amici curiae were permitted to appear as *amici curiae* before the Court of Appeals for the Ninth Circuit.

REASONS FOR SUPPORT

1.

Neither the District Court Decision Nor the Circuit Court Decision Are Supportable by the Authorities, Treaty Language, Findings of Fact, or Logic

The different Stevens treaties all utilized approximately the same language:

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1. A group represented by the Washington Reef Netters Owners Association had been permitted to intervene by another district court judge. However, its fishing is limited to a small area of northern Puget Sound and use of stationary gear. Much of that group's concern is a factual issue unique to them: whether present reef net sites and gear are different from Indian reef net sites in treaty times. Purse seiners, gill netters, trollers, "kelpers", charter-boat operators and processors were not parties to the case below.

> "The *right of taking* fish, *at all usual and accustomed grounds and stations,* is further secured to said Indians, *in common with all citizens. . . .*" (Emphasis supplied)

Except for these reserved rights, the Indians ceded sovereignty over all lands and waters outside their reservations. They reserved no rights to fish other than at their "usual and accustomed grounds and stations", agreed that non-Indians could fish in common with them at their usual and accustomed fishing grounds and placed no restrictions on the non-Indians' use of ceded lands and waters.

The district court expressly found that the Treaty Indians understood the restrictive nature of "usual grounds and stations" (F.F. 24, R. 1598), and further found that:

> ". . . the Indian's harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. The amounts of fish that could be harvested were particularly affected by run-size fluctuations caused by natural conditions and water conditions occurring at the time the fish were running, e.g., flooding, which limited the effectiveness of Indian fishing gear." (F.F. at 6, R. 1584)
>
> ". . . George Gibbs noted that:
>
> " 'As regards the fisheries, they are held in common and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season.' " (F.F. at p. 10, R. 1588)
>
> ". . . The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, but the white man would also be allowed to fish . . ." (F.F. 20, p. 16, R. 1594)
>
> ". . . there is no evidence at the time of the treaties

> that either party intended to restrict the other party's fishing . . ." (F.F. 28, at p. 22, R. 1600)

Conversely, there was no finding whatsoever that there was any Indian cultural concept or understanding of being entitled to own or catch any fixed quantum or proportion of fish.

Notwithstanding, the district court ruled, as a matter of law, that the words "in common with" gave the Indians an inheritable right to catch 50% of the harvestable fish. The only basis for this ruling, other than a reference to treaty interpretation rules which enjoin liberality, and the only legal precedent ever cited by the court or the plaintiffs for this startling interpretation of the treaty words "in common with" is a definition of the word "common" from 1828 and 1862 editions of Webster's American Dictionary of the English Language (F.F. 24, p. 19, R. 1597). The full language of this definition reads:

> "1. 1. ***Belonging equally to more than one, or to many indefinitely***; as life and sense are common to man and beast; ***the common privileges of citizens***; the common wants of man. 2. ***Belonging to the public***; ***having no separate owner***. The right of a highway is common. 3. General; serving for the use of all . . ." 1828 ed. Webster's American Dictionary of the English language.
>
> (Emphasis supplied)

The first point to remember therefore is that the extraordinary innovations in the decisions and orders below were basically contrived from this dictionary definition without the benefit of any direct legal precedent.

It is to be noted that plaintiffs (respondents before this Court) constantly refer to the district court's decision as giving the Treaty Indians not 50% of the fish but merely

the opportunity to catch up to 50% of the fish. This is a distinction with no difference because the court's decree provides that the non-Indian fishing activity must be cut back until the Indian quota is taken. The quotas are determined by counting the fish caught. As the modern non-Indian fishery is a predominantly marine fishery and as salmon in the case area are mostly taken while migrating towards terminal areas, any closure of the marine fishery means that the salmon are permanently lost to the non-Indian fishermen.

Furthermore, the district court held, contrary to established law, that fishing by non-Indians is a mere privilege, not a right, and as such is revocable at will. The significance of this questionable premise in the framing of the court's decree is that it facilitates the restriction and curtailment of the non-Indian's fishing rights and his access to the common fishery in state waters, with total impunity and, we submit, without regard for constitutional protections.

The premise that a citizen's right to fish is a mere privilege is erroneous. *Martin v. Lessee of Waddell,* 16 Pet. 367 (1842); *Smith v. Maryland,* 18 Howard 71 (1855); *McCready v. Commonwealth of Virginia,* 94 U.S. 391 (1877); *Geer v. Connecticut,* 161 U.S. 519 (1896); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948). See also: *Department of Game v. The Puyallup Tribe,* 414 U.S. 44 (1973). Furthermore, there is nothing in the language of the treaties, the record or the findings of fact to indicate any intent to treat the non-Indians' right to fish "in common" as inferior to the Indians or to permit the Indians to impose or require

restrictions on non-Indian fishing activities in the ceded territory. If anything, the record indicates that such positions were contrary to the understandings and cultural concepts of both parties to the treaties.

The district court then held that *in addition* to the 50%, the Indians are also entitled to: 1. all the salmon they catch on their reservations; 2. all they catch for ceremonial purposes; 3. all they catch to eat; 4. all they catch as participants in the all-citizen fishery whether on or away from their usual and accustomed grounds and stations; plus 5. an "equitable" adjustment for the number of fish caught by non-Indians outside the jurisdiction of the state of Washington.

The Court of Appeals for the Ninth Circuit did not rule on the propriety of the district court's holding that the words "in common with", as a matter of law, entitled the Indians to 50% of all harvestable salmon and steelhead plus the various additional allotments. The court of appeals instead went off on a theory of its own creation. It analogized the treaty language to a cotenancy in the fish and the litigation to a request for a partition. This application of "ownership" principles is totally foreign to cultural concepts and understandings of all parties to the treaties as established by the district court's findings of fact. Furthermore, the court of appeals failed to apply the same theory and standards of accountability to the Indians with regard to their fishing activities—particularly away from the usual and accustomed grounds and stations.

Ultimately, the court of appeal's decision rests upon a purported affirmance of the district court's exercise of "discretion" so as to "best protect the interests of all parties, as

well as those of the public". In fact, the district court did not, and did not purport to, exercise any discretion—it ruled as a matter of law, based on a misapplied interpretation of a definition in an 1828 English language dictionary, as to the meaning of the treaties. Nor did the district court at any time consider, balance or protect the interests of the non-Indians, the public, the State, or the Nation. Aside from a paternalistic mention in Finding of Fact 29 that "fishing is also important to some non-Indians" (R. 1601) the findings of fact and opinion basically ignore the circumstances of the 99.72% of the citizens in the case area who are not Indians. Nowhere in the findings of fact or opinion—which deal at great length with the importance of salmon to the Indian—is there any analysis of the importance of the salmon to the non-Indian or of the impact of the mandated closures and restrictions upon the non-Indian. There is no word that the Pacific salmon is a treasured public resource, the most valuable fishery in the United States, of all floating fish; no word that the Pacific salmon is a subject of intense international competition with aggressive fishing competitors as Japan, Russia and Korea, requiring the enterprise of American fishermen and sensitive international compacts, all exerted in our national interest.

The granting of a permanent 50% plus ownership in anadromous fish to tribal members is necessarily arbitrary and illogical. A quantified ownership bears no relationship to the number of Indians who actually fish, of all Indians, or to the number of Indians who fish compared with the number of non-Indians who fish, or to the number of Indians who fish now as compared to in 1855, or to the importance of fish in their livelihood now as compared to

in 1855 or to any other standard. If but one single Indian remained he would still have a hereditary right to 50% plus of all fish in his ancestral fishing grounds, whether he fished or not. The fallacy here lies not in the selection of any particular percentage. It lies in deciding this question in terms of *any* permanent percentage, and in interpreting the language of the Stevens treaty in terms of ownership concepts which are foreign to the treaty language, established law and Indian cultural concepts.

It is significant to note that neither the district court nor the court of appeals analyzes this result from the standpoint of equal protection principles which this Court has recognized as being required in the application of the specific language and treaties now before this Court.

> ". . . [We] add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'" *Puyallup Tribe v. Department of Game*, 391 U.S. 392 at 403 (1968).
>
> "The case was remanded for determination of . . . 'the issue of equal protection implicit in the phrase "in common with"' as used in the Treaty.
>
> * * *
>
> "What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> "The aim is to accommodate the rights of Indians under the Treaty and the *rights of other people.*" (Emphasis supplied) *Department of Game v. Puy-*

allup Tribe, 414 U.S. 44 at 45, 48-49 (1973).

This case presents a classic example of adding wholly new provisions to an Indian treaty to ameliorate a claimed injustice. This Court has repeatedly held that such interpolations are improper. In *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943), this Court, after acknowledging the liberal view of interpretation relied on below, went on to say, in reversing the lower court decision which was based upon "findings" of Indian intent:

> "But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. (Citing cases) . . ." 318 U.S. at 432.

Also:

> "But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as an injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the government . . . to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law." *United States v. Choctaw Nation*, 179 U.S. 494 at 532-533 (1900).

Also:

> "But the context shows that the Justice meant no

more than the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress." *Northwestern Band of Shoshone Indians v. United States*, 324 U.S. 335 at 353 (1945).

2.

The Interpretation and Application of the Treaty, As Affirmed by the Court of Appeals, Is Unconstitutional

The Constitution of the United States is of course binding upon all branches of the government—legislative, executive and judicial. There is no doubt that treaty provisions must comply with or give way to the provisions of the U.S. Constitution:

> ". . . It would not be contended that it [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of its states. . . ." *Geofray v. Riggs*, 133 U.S. 258 at 267 (1890).

> ". . . There is nothing in this language [the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . ." *Reid v. Covert*, 354 U.S. 1 at 16 (1957).

The judgment and order in the case before this Court effectively deny non-Indian fishermen in the State of Washington constitutionally protected rights. Citizens and residents outside the State of Washington continue to assert and exercise, on a non-discriminatory basis, their right to exploit the common fisheries in Washington waters.

Salmon off the western coast of the United States run in mixed stock—salmon caught in the ocean off the State of Washington are returning to spawning streams in California, Oregon, Washington and Canada. Conversely, salmon returning to spawning streams in the State of Washington are caught in ocean waters off the coasts of Alaska, Oregon, California and Canada by citizens and residents of those states and that nation. Citizens and residents of Alaska, Oregon and California continue to enjoy their right to fish off the coast of Washington and to catch Washington spawned fish off the coasts of the other states.

On an argument raised for the first time some 120 years after the signing of the treaties, based upon a unique and arbitrary interpretation of treaty language, the citizens and residents of the State of Washington are now judicially restricted from equally exercising those same rights. As to these citizens and residents, there now exists a discriminatory restriction upon their use of the common fishery in order to make a permanent allocation of over 50% of the state's fisheries resources to a small (0.28%) ethnic minority of the citizens of the state.

This is so in spite of the precept that all citizens of the state have:

> ". . . a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and (may) not, without injury to their right, be restrained of it. . . ." *Martin v. Lessee of Waddell*, 16 Pet. 367 at 412 (1842).

Nowhere in the Enabling Act of February 22, 1889, 25 Stat. 676, under which Washington became a state, do the citizens disclaim or surrender their rights to exploit the

common fisheries, particularly of the marginal seas.[2] Furthermore, that Enabling Act declares that:

> ". . . the proposed states . . . shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation." (Section 8)

The right of all citizens to exploit the common fisheries in the marginal seas has remained fully effective and recognized by the Supreme Court. This right is also subject to the protection of both Art. IV, Section 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the Several States") and the Fourteenth Amendment of the U.S. Constitution, which states:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person the equal protection of the law".

Two significant decisions applying the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment to rights of commercial fishermen are: *Toomer v. Witsell*, 334 U.S. 385 (1948); and *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

In *Toomer* the Court held:

> "[W]e hold that commercial shrimping in the marginal seas . . . is within the purview of the privileges and immunities clause . . ." 334 U.S. at 402-403.

In *Takahashi*, the plaintiff challenged a California statute which denied plaintiff the right to a commercial fishing license because, although he was a long-time resident and had been a commercial fisherman for 27 years, he

2. They disclaimed only title to the *lands* reserved to the Indians (Section 4, Second).

was "a person ineligible to (United States) citizenship." The Court struck down the statute as being an unconstitutional deprivation of rights in violation of the Fourteenth Amendment. The Fourteenth Amendment means that all persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws.

> "[Its supposed "ownership" of the fish] is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing . . . while permitting all others to do so." 334 U.S. at 421.

It is to be noted that the treaty before the court, by use of the word "in common with", itself repudiates the idea that it was intended to, or could, create discriminatory classifications.

At least since the adoption of the Fourteenth Amendment in 1865, and certainly since the enactment of the Indian Citizenship Act (43 Stat. 253), the Indian inhabitants of Washington have not only had the right to fish at their usual and accustomed places and on their reservations, but have also had the right to participate freely and equally with non-Indians in the common fishery on marginal seas. As noted, inhabitants of other states have also exercised rights to fish in the marginal seas of their states and in Washington waters, and, as the lower court recognized and found, they catch substantial numbers of salmon outside of Washington waters and jurisdiction which would otherwise have been available to inhabitants of this State. (F.F. 185, p. 102, R. 1680.) Salmon, being an anadromous fish, is no respector of state boundaries and fishermen fishing the marginal seas (Indian and non-Indian alike)

catch salmon running in mixed stocks which would otherwise return to a number of different states or to Canada. (Ex. JX-2a, figures 7 and 8, pp. 00241, 00242)

Under the lower court's ruling, the State is *required* to enact and enforce discriminatory regulations against 99.72% of the population in the case area. The State is to be *forced* to allocate the resources of this 99.72% of its citizens and expend them to place a monopoly control of well over 50% of its harvestable fish in the private hands of a 0.28% ethnic minority of its citizens. In addition, the State is required to permit this ethnic minority to compete freely with the other 99.72% of the citizens in exploiting the fishery at other than Indian's traditional fishing place, and if "a tribal member fishes in the all-citizen fishery at a location which is not a usual and accustomed ground or station of his tribe, that individual's catch will not count toward the tribal off-reservation share." (Ruling on Post-Decision Motions, Exhibit A, p. 3.) The lower court holds 11 state statutes and numerous state regulations void as applied to the Indians, while they must continue to be enforced against non-Indian fishermen.

In short, under the lower court's treaty interpretation and rulings, which are strained and unnecessary in the first place, non-Indians in this state are deprived of privileges and immunities held by other citizens and deprived of the equal protection of the laws with regard to their access to and utilization of the common fisheries on the marginal seas.

A further error in the decision below lies in the persistent failure to distinguish between the power of the federal government to prevent a state from interfering with a

treaty, and the lack of power to require a state to appropriate its resources to *implement* a federal treaty. Our research discloses no text or case authority that under the American Constitutional system the federal government, speaking through a treaty or speaking through a district court, can order a state to allocate its resources discriminatorily to discharge a federal treaty promise, particularly where, as here, the resource is not owned by the state in a proprietary sense, but as a custodian for its citizens as a whole. ". . . [T]he ownership is that of the people in their united sovereignty. . . ." *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

This concept may be tested by example. Of course, the Washington Departments of Fisheries and Game and the state's fish management activity rest solely upon the declaration of the citizens of Washington, expressed in legislation, that these are worthwhile activities. The state has no inherent responsibility to propagate or manage fisheries apart from statute. If the people of Washington through their legislature were to reconsider the worth of these measures, repeal these statutes and withdraw appropriations from Fisheries and Game, with the result that Washington salmon runs were overfished to the point of extinction, it could not lie within the competence of a federal district judge to sign an injunction ordering the re-enactment of these laws, appropriation of moneys, and subsequent executive administration of the laws in the way which that court feels will effectuate his interpretation of a treaty.

It cannot be argued that the decision and orders below do not constitute a reallocation of this resource. The court

orders that the tribes be given preferential rights up to 50% of the harvestable fish, plus reservation and subsistence catches and an "equitable adjustment," and orders that the state and its administrative officers withdraw these fish from the non-Indian fishermen.

This analysis would apply even if it were conceded that the Stevens treaties have the meaning ascribed to them in Final Decision #1. Indeed, if the plaintiff tribes and the court below were correct in their interpretation of the treaty language, the solution could still not constitutionally lie in the direction of issuing orders to the state of Washington mandating the state to give the Indians this public state resource. The remedy for an alleged broken federal promise is federal compensation.

3.

Other Issues Raised By Parties

Amici curiae will not discuss in detail other issues raised by petitioners because the ramifications of these issues and the need for review by this Court is well stated in the petitions. However, we suggest that two of the issues presented by this case are of unusual public significance and particularly merit review.

First, the unsettling impact of the decision below upon the treaties between Canada and the United States regulating the Fraser River sockeye and pink salmon fisheries, and upon the operations of the International Pacific Salmon Fisheries Commissions, is of great public importance.

Second, the unsettling effect of the newly created dual sovereignty between the State of Washington and the numerous Indian Tribes with respect to the salmon fishery,

together with the district court's continuing role as the supreme fisheries administrator, presents a problem of most serious and continuing concern. Both issues transcend in their public importance the bare question of treaty fishing rights.

CONCLUSION

It is believed that this is one of the most important Indian treaty cases to be presented to this Court. A full review by this Court is necessary not only to correct errors on substantive issues but also to re-establish rights of non-Indian citizens and to re-establish the State of Washington in its proper role in the management and conservancy of a sensitive public resource. *Amici curiae* urge this Court to grant certiorari on all three petitions. We respectfully urge the Court to order the parties to supplement the record with all of the proceedings before the district court since its initial decision so that the issues and ramifications can be fully understood.

We also respectfully request that *amici curiae* be permitted to present a brief on the merits following the grant of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-705

WASHINGTON REEFNET OWNERS ASSOCIATION,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

BRIEF OF RESPONDENT LUMMI INDIAN TRIBE IN OPPOSITION TO PETITION OF WASHINGTON REEFNET OWNERS ASSOCIATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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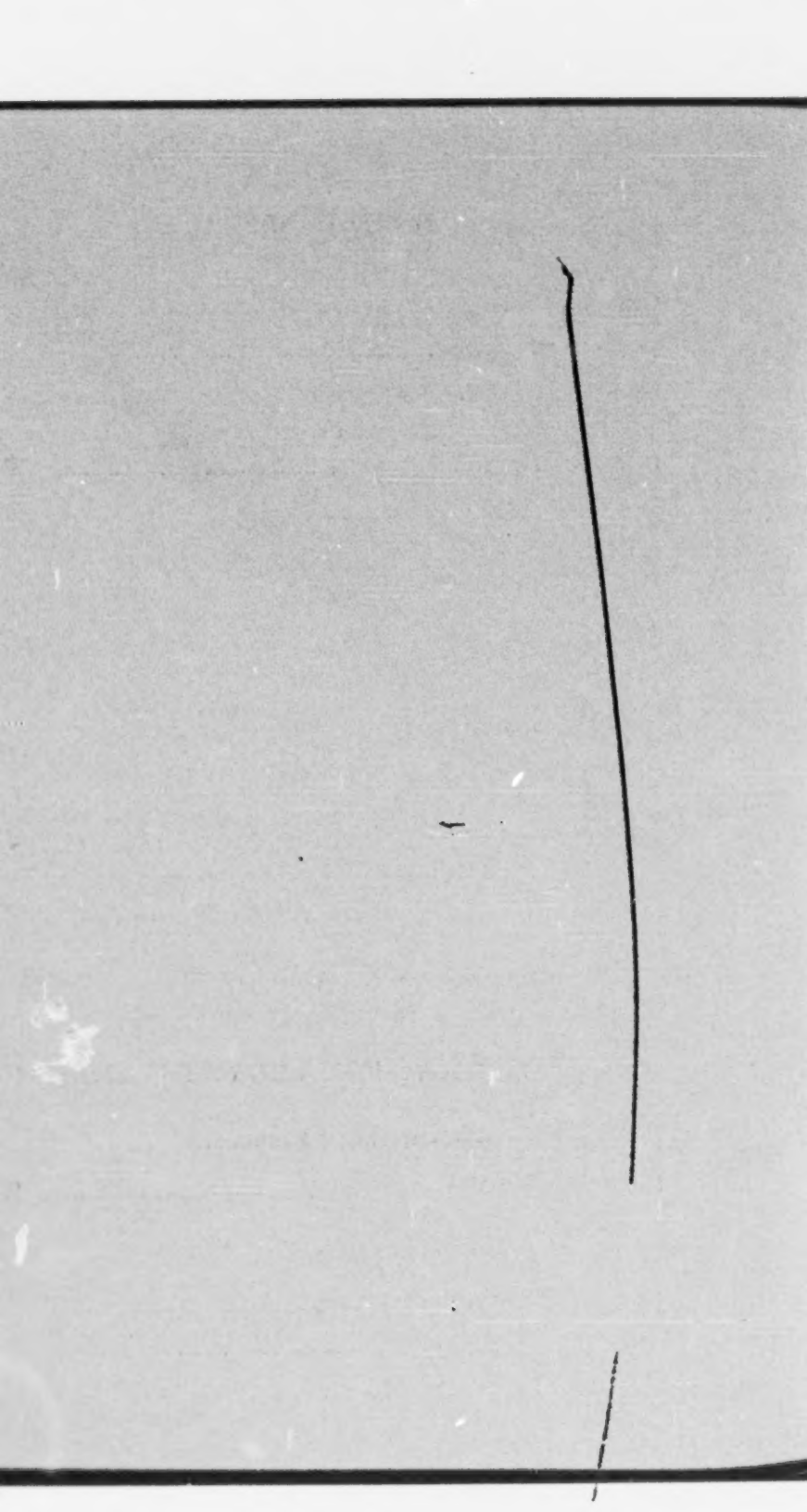

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OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is published at 520 F.2d 676. The District Court's Opinion appears at 384 F.Supp. 312. Both Opinions are included in the Appendix attached to the Petition filed with the Court by Petitioner State of Washington in the related cases, Numbers 75-588, 75-592.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in upholding the District Court's finding that the present reef net fishing area in Legoe Bay off Lummi Island is within the usual and accustomed grounds and stations of the Lummi Indians?

TREATIES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

The Treaty of Point Elliott, January 22, 1855, 12 Stat. 927, Article V, provides:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory . . .

Article VI, United States Constitution requires that:

> . . . all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . .

STATEMENT OF THE CASE

Proceedings Below

In September, 1970, the United States commenced litigation against the State of Washington on its own behalf and as trustee for several Indian tribes, charging that State statutes, regulatory provisions and practices were violative of the rights of Indians to fish in the waters of Western Washington as guaranteed to them in six treaties made between the tribes and the United States, including the Treaty of Point Elliott, *supra.* Shortly afterwards, a number of Indian tribes party to the treaty intervened as plaintiffs. The Lummi Indian Tribe was one of the intervenor-plaintiffs.

The Lummi complaint in intervention alleged, in addition to the general allegations of State violation of treaty rights, that non-Indians, operating under licenses issued by the State of Washington, had monopolized reef net locations at the Lummi's usual and accustomed grounds and had excluded them from reef netting, in violation of their treaty rights.

The Reefnet Owners Association intervened and claimed that they "enjoyed historic fishing rights" in the waters of Lummi Island, among other areas, and were entitled to continue using these rights under state law. The issue between the Lummis and the Reefnet Owners Association was stated in the final pretrial order as being: whether the sites of non-Indian reef net fishermen are on the usual and accustomed grounds and stations of the Lummi Indians; and, if so, whether these non-Indians have monopolized these grounds to the exclusion of the Lummi Indians.

The District Court found in the affirmative as to both issues after taking extensive evidence. (Fourteen findings of fact were made on the issues) The Court deferred for later consideration the relief to be afforded the Lummis.

The Petitioners appealed to the Ninth Circuit Court of Appeals on the issue between the Reefnet Owners and the Lummi Indians. That Court considered this issue separately from the general issues in the case between the State of Washington, the United States and the intervenor Indian tribes. The Ninth Circuit Decision upheld the District Court in its disposition of the claims of the Lummi Indian Tribe and specifically sustained its finding of fact that the reef net operations were within Lummi usual and accustomed grounds.

The question of whether the Reefnet Owners are fishing on Lummi usual and accustomed ground is brought to this Court only on the Petition of the Reefnet Owners and is not raised by any of the other parties.

Summary of Facts

The technique of reef net fishing was developed by the Indians. Both the aboriginal and modern reef net operation employ the same basic principle developed and used by the aboriginal Lummis; namely, the creation of an artificial reef by means of ropes camouflaged with grass and other materials to give an appearance of a reef and to lead the migrating salmon upward into a net slung between two boats which is lifted when the fish enter the net. Modern gear incorporates numerous refinements and improvements, including the addition of electric power to pull the nets and heavy anchors and cables to hold the boats against tidal currents.

The Court found that Legoe Bay was one of the Lummi usual and accustomed reef net areas at the time of the making of the Treaty of Point Elliott. After the Treaty, the Indians continued to use these locations until about 1894 when fish traps operated by whites were installed so as to render valueless many of the Lummi reef net locations. The Court further found that as a result of the white's use of fish traps (now illegal under state law) and by the widespread use of other fishing gear, the fish had been driven from the shallower waters and now could only be taken in the deeper waters of the Bay.

The Court found that all Lummi reef net fishermen had been squeezed out of the fishery and that of the present

43 reef nets being operated in Legoe Bay, none was owned by a Lummi. These locations are occupied by members of the Petitioner association who occupy fixed positions on the grounds and maintain a "gentlemen's agreement" to the effect that they will not yield their location to anyone unless the occupant is willing to sell his equipment to a would-be purchaser. If the member does not desire to sell his equipment, no change in occupancy of the location can occur There is no voluntary yielding of the location or rotation to other locations. Most importantly, the members of the reefnetter's association do not recognize Lummi Indians as having any treaty right to occupy a position on the reef net grounds, and as far as the Reefnet Owners are concerned, they would not concede that an Indian has any different right than a non-Indian seeking to acquire a location on these grounds.

ARGUMENT

A. The Question Presented by the Petition is Entirely a Question of Fact and is Therefore Not a Proper Basis for Granting Certiorari

The Petition states the question presented for review as follows:

> Are the present-day reefnetters operating in what were, at treaty times, "usual and accustomed grounds and stations" of the Lummis?

The issue as stated by the Petition, is entirely a question of fact, and as such, is not a proper basis for granting of certiorari. Furthermore, the issue of fact involves only the Lummi Indian Tribe and the Washington Reefnet Owners Association—no other parties are involved.

The Petitioner urges that the question of whether its members are, *in fact*, fishing upon the "usual and accus-

tomed grounds and stations" of the Lummis presents "an important question of federal law". The assertion is wholly unsupported by anything in the Petition. An examination of the Petition itself fails to disclose any analysis or discussion of any question of law. Instead, the Petition deals entirely with evidentiary matters which are urged as warranting reversal of the District Court.

Like all such arguments, the recital adverts to items of evidence, testimony of witnesses, affidavits and the like, which is highly selective and omits contrary evidence and the larger context in which the evidence was taken. The argument does nothing more than invite the Court to reconsider evidence going to a narrow issue of fact which was decided contrary to the Petitioner's claims. The Petition therefore fails to meet the requirements of Rule 19(1) of the Rules of the Supreme Court and should therefore be denied.

B. The Record Abundantly Supports the Findings Relevant to This Petition

The Petitioner's claim is that their members are fishing in deeper waters than were fished by the Lummi Indians at treaty times by means of devices not in existence at treaty times, (even though within the waters of the same bay) and that they are not on "usual and accustomed grounds" as that phrase is used in the Treaty.

But the District Court found that at the time of the Treaty, the waters of Legoe Bay were a usual and accustomed reef net fishing ground of the Lummi Indians. That after the making of the Treaty, the Indians continued to reef net on these grounds until fish traps operated by whites substantially interfered with their operations. These traps

were outlawed by State law in 1934, but since the cannery which bought their fish had closed, they did not resume the fishery until 1939 when a new cannery opened. By this time however, non-Indians had entered the reef net locations. The non-Indians gradually squeezed out the few remaining Lummis, so that today no Lummi reef nets remain.

There are now 43 reef nets being operated in Legoe Bay. Although some positions in the fishery are vacant, they remain so because the sites are not productive. The location of the reef net is one of the most critical factors in the success of the operation and profitable positions are occupied permanently, unprofitable ones abandoned or operated intermittently or experimentally.

Most importantly, the Court found that the heavier volume of fish in the vicinity of Legoe Bay had travelled close to shore, but due to the installation of fish traps and the abundance of other fishing gear in the reef net area, the migratory path of the fish has changed so that now fish must be taken in deeper water.

In aboriginal times Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time, including the operation of the reef nets. Since treaty times, Indians and non-Indians have adopted new fishing techniques and gear. Indians no longer fish from dugouts just as non-Indians no longer fish from wooden sailboats. Indians no longer use bark nets and non-Indians no longer use cotton or linen nets. Acculturation of western Washington Indians into western culture began prior to treaty times and has continued to the present day. Modern gear incorporates numerous refine-

ments and improvements over the aboriginal Indian gear, including the addition of electric power to pull the net.

All the economic reef net locations are occupied by memmers of the Reefnet Owners Association so as to maintain an exclusive occupancy system. A member of the Lummi Tribe can reef net in a profitable location only by purchasing, from a present reefnet owner his fishing gear, *provided* such owner is willing to sell. No present-day Lummis are willing to contest any of the present occupants for possession of a reef net site nor are they willing to invest money in gear to occupy locations which are not economically productive. Lummi Indians would be interested in participating in the fishery if they had access to productive locations, but object to having to purchase a white reefnetter's fishing gear in order to occupy a good location.

The Court specifically found that some of the present-day non-Indian reef net gear in Legoe Bay is located directly over the stations occupied by the Lummis at treaty times and thereafter.

These findings are determinative of the claim of Petitioner that it's members' reef netting activities in Legoe Bay are not in contravention of the rights of the Lummi Indians under the Treaty of Point Elliott.

The Petitioners made the same contentions before the Ninth Circuit as they make in their Petition for Certiorari, but obviously failed to meet the burden of showing the District Court findings to be clearly erroneous, the standard which is applicable under Rule 52(a), Federal Rules of Civil Procedure. As the Ninth Circuit stated in its opinion:

> Insofar as the district court thus concluded that usual and accustomed grounds and stations extended a suf-

> ficient distance from shore into Legoe Bay to enable the Indians to harvest most productively the available fish, that finding is not clearly erroneous. The term "grounds" as used in the treaties denotes a broader dimension than "stations" and can readily be understood to include the distances from shore at which present reef netting is done.

520 F.2d 676, 692 (9th Cir. 1975)

C. The Relief Granted is Clearly Correct as a Matter of Law

Having found that the Legoe Bay reef net area is a Lummi usual and accustomed ground, the courts below ruled that Lummis could not be excluded from participating in the fishery on those grounds by "gentlemen's agreement" or otherwise. Instead, Lummis had a federally guaranteed treaty right to participate in the fishery on an equal basis with the non-Indians, and to enjoy the benefits of the principle of equal division which is applicable to other usual and accustomed areas.

Having found that the Petitioners are occupying all of the productive sites on the Respondent's usual and accustomed grounds the court below was clearly correct in concluding that the Respondents were entitled to equal access under the "in common with" clause of the Point Elliott Treaty. Nor could the Petitioners foreclose access to these grounds by virtue of their physical control of these stations within the grounds. *United States v. Winans,* 198 U.S. 371 (1905).

The District Court did not reach the question of the specific relief which would be granted to the Lummi Tribe in gaining access to this fishery, but left this for future determination by the court. The Ninth Circuit modified this by suggesting that in granting future equit-

able relief, "the district court should give regard wherever practicable to minimizing the resulting hardship to present white reef net fishermen". 520 F.2d 676, 692 (9th Cir. 1975)

CONCLUSION

1. The Petition of the Washington Reefnet Owners Association should be denied because the only question which it raises is an issue of fact. That issue is one which directly affects only the Petitioner and this Respondent.

2. The factual arguments made by Petitioner were carefully reviewed by the Ninth Circuit which refused to disturb the lower court's findings and ruling on the issue. The District Court's findings of fact are abundantly supported by the evidence. Petitioner has failed to persuade the Ninth Circuit that the findings are "clearly erroneous" as required by the Federal Rules of Civil Procedure.

3. The Petition fails to demonstrate that the issue it raises is "an important question of federal law which has not been, but should be, settled by this court", nor does it demonstrate that the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision." (Rule 19, Supreme Court Rules)

4. The decision of the court below on the issue raised by the Petition is correct as a matter of law.

Respectfully submitted,

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